U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 August 2005

CASE NO.: 2004-LHC-2233

OWCP NO.: 07-765809

IN THE MATTER OF:

JOHNNY BROUSSARD

Claimant

v.

QUALITY SHIPYARDS, INC.

Employer

and

ZURICH AMERICAN INSURANCE, CO.

Carrier

APPEARANCES:

MICHAEL G. HUEY, ESQ.

For The Claimant

COLIN SHERMAN, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Johnny Broussard (Claimant) against Quality Shipyards, Inc. (Employer) and Zurich American Insurance, Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 22, 2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 18 exhibits, fourteen of which were received into evidence. Employer/Carrier proffered 20 exhibits, eighteen of which were admitted into evidence, along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Subsequent to formal hearing, the parties submitted one additional joint stipulation regarding the date of maximum medical improvement. Employer/Carrier withdrew two additional exhibits, identified as Exhibit Nos. 10 and 19. Claimant submitted three additional exhibits without objection from Employer/Carrier, marked for identification as CX-18, CX-19, and CX-20, which are hereby received into evidence. Since Claimant had previously submitted a protective mask as CX-18, the vocational report of Dr. Grimstad, identified post-hearing as CX-18, is received as CX-18(a).

Post-hearing briefs were received from the Claimant and the Employer/Carrier. The Regional Solicitor filed a brief regarding Section 8(f) relief. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship at the time of the accident/injury.

2. That Employer/Carrier filed a Notice of Controversion on January 17, 2003.

[1] References to the transcript and exhibits are as follows: Transcript: Tr. ____; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

3. That an informal conference before the District Director was held on December 18, 2003.

4. That no benefits have been paid to Claimant.

5. That Claimant's average weekly wage at the time of injury was $788.37.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. Whether Employer received timely notice of injury.

3. The nature and extent of Claimant's disability.

4. Entitlement to and authorization for medical care and services.

5. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

6. Section 33(f).[2]

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing and was deposed on January 9, 2004 and February 1, 2005. (EX-13; EX-14). Claimant was 46 years old at the time of formal hearing. He has an eighth grade education and received poor grades in special education classes. (Tr. 44-45). He attended welding school after testing revealed that he was dyslexic. (Tr. 45). He testified that he cannot read, he can do "very little" writing, and he can do limited addition and subtraction. (Tr. 46; EX-13, p. 20). He has not obtained a GED. (EX-13, p. 19).

[2] The Joint Stipulation identifies Section 33(g) as an issue; however, Employer/Carrier discussed only Section 33(f) in their post-hearing brief.

Claimant learned "plate welding" at trade school and he performed "all kinds of welding," including welding of "stainless, mild metals" and carbon steel. (Tr. 51-52). He also learned "submerged metal arc welding" and brazing. (Tr. 52). Claimant testified that he did not use a respirator or mask. (Tr. 52-53).

Claimant is five feet, eight inches tall and weighs approximately 136 pounds. (Tr. 53-54). Because of his size, Claimant often worked in "the tight spots" and poorly ventilated areas. (Tr. 54). He testified that he performed "very little" work in open areas. (Tr. 55).

During his career, Claimant performed welding on steel, "iron and some stainless." (Tr. 56). He further testified that he performed "all electrical based" welding and "arc" welding, but did "a little bit" of "open-flame welding." (Tr. 57; EX-13, p. 88). He used welding rods made specifically for "arc welding" and sometimes welded on painted metal and over fluids such as oil or diesel. (Tr. 57-58). At his first deposition, Claimant testified that he welded "all iron" and that he may have been around aluminum welding when he walked through the "shop."[3] (EX-13, p. 86). He also testified that he had welded brass and galvanized steel.[4] (EX-13, p. 87). Claimant testified that he used rods to weld stainless and mild steel and that he used electrodes to heat the rods. (Tr. 99-100).

During Claimant's employment history, he was exposed to sandblasting, asbestos, and paint fumes. He also worked on gasoline barges. (Tr. 83). He witnessed crop dusting as a child, but did not recall whether he had actually breathed in the dusting material. (Tr. 83; EX-13, pp. 84-89). He could not recall whether he had ever been exposed to benzene. ((EX-13, p. 93).

Claimant was hired to work for Employer on or around July 16, 2001 by Al Boudreaux and testified that Mr. Boudreaux probably assigned his work through Johnny Cowell. (Tr. 80; EX-5). At his deposition, Claimant identified Mr. Cowell as his "boss" and indicated that orders were received from Mr. Boudreaux. (EX-13, pp. 27-28).

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[3] Claimant did not specify the kind of welding he performed for Employer. However, it can be assumed from his testimony that he performed the foregoing activities while employed as a welder for Employer. This assumption is corroborated by the testimony of Al Boudreaux.

[4] It is not clear whether Claimant performed such welding on a frequent or occasional basis.

Claimant testified that he was given "dust masks" as breathing protection while working for Employer. However, he did not use a "true respirator," which he described as a facial mask with two filters on each side. (Tr. 66). Claimant did not know such respirators were available until he saw a "fitter" using one and was told the respirators were available from the tool room.[5] (Tr. 67, 68-69). Claimant attempted to use the respirator, but could not use it because it "hits your shield and you can't see to weld." (Tr. 67).

Claimant used a dust mask in the morning and a new mask in the afternoon, but also testified there were times when he could not wear a mask at all. (Tr. 67-68). He testified that this was true for his employment at Employer and throughout all of his shipyard employment elsewhere. (Tr. 68). Claimant was never told that wearing safety equipment was mandatory during employment with Employer. He further indicated it was not mandatory at his other welding jobs because "[n]obody really pushes that issue." (Tr. 83). However, at his deposition, Claimant testified he always wore a dust mask while working. (EX-13, p. 39).

Claimant sought medical treatment on April 4, 2002, because he had not been feeling well for approximately one month and believed he had the flu. (Tr. 69). He presented to the hospital with complaints of light chest pain. (Tr. 70). An x-ray and CAT scan revealed cancer and pneumonia in both lungs. (EX-13, p. 58). Claimant's entire right lung was removed and he was placed on a ventilator for 12 to 15 days. (Tr. 61, 70). He remained in "recovery" for about one week. (Tr. 61, 63).

The hospital recommended Dr. St. Martin as Claimant's physician so he could proceed with the tests. Dr. St. Martin recommended Dr. Rau as Claimant's surgeon. (EX-13, pp. 59-60). Dr. Rau referred Claimant to Dr. Doria as a "cancer specialist." (EX-13, p. 75).

On April 19, 2002, while in recovery, Claimant spoke to the "safety man" regarding insurance. Prior to April 19, 2002, Dr. Rau informed Claimant that his lung cancer could have been caused by "welding rods" and Claimant reported this to the "safety man." (Tr. 61-62). Claimant did not recall completing any of the information contained on the insurance paperwork.

[5] Claimant testified that respirators and masks were mentioned during the monthly safety meetings. (Tr. 69).

(Tr. 62-63). Claimant stated he was on medication, although he could only specifically recall being on Morphine. (Tr. 72).

After he was released from the hospital, Claimant went to Employer's "yard." He "thinks" he told two superintendents that he believed his cancer was caused by welding.[6] He testified that a man "in the office" said he would not be able to prove it. (Tr. 64). Claimant also testified he told a safteyman named "Tony" that his lung cancer was caused by his work.[7] (Tr. 64-65). During his deposition, Claimant stated that he spoke to "Tony" after he was released from the hospital. (EX-14, p. 34). Although he did not have an attorney, he filed a claim with the Department of Labor, as well as a state compensation claim, because the statute of limitations was going to expire.[8] (Tr. 73-74).

Claimant testified that Dr. Rau initially opined his cancer was caused by both welding and smoking. After the surgery, Dr. Rau informed Claimant that he believed the cancer was due to smoking and was not due to welding. (Tr. 94; CX-13, p. 71). Claimant changed doctors because he believed "the company bought [Dr. Rau] off." (Tr. 96). Claimant continued to treat with Dr. Doria, who referred him to Dr. Caletri. (Tr. 96, 101).

In May 2003, Claimant sought treatment from Dr. Marable after being told that the doctor "could test you for asbestos and welding rod fumes." (Tr. 75). He testified that Dr. Marable opined his cancer was caused by welding fumes. (EX-13, p. 76).

Claimant was admitted to Terrebonne General Medical Center approximately every six months for follow-up on a remaining tumor. (Tr. 76; EX-13, pp. 61-62). Around March 31, 2004, Claimant contacted Dr. Doria's office for an early check-up. (Tr. 76). Dr. Doria began chemotherapy and radiation treatments. Claimant's lung was punctured and collapsed when a "port" was being inserted for the chemotherapy treatments.[9] Claimant remained in the hospital and on a ventilator machine for "a little while." (Tr. 77).

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[6] Claimant stated that he informed "Mike" and another superintendent who he could not name. (Tr. 64).

[7] Claimant could not provide a last name for "Tony." The record contains insurance documentation signed by Anthony Boudreaux on April 26, 2002. (Tr. 65).

[8] Claimant learned of the statute of limitations and filed two separate claims after speaking with attorneys. (Tr. 82).

[9] Claimant did not remember the name of the doctor who caused his lung to collapse. (Tr. 93).

At the time of formal hearing, Claimant was not taking any medications on a regular basis, but he was using oxygen on an as needed basis. (Tr. 39-40). He testified that he was trying to become "weaned off" the oxygen, but still needed it when he exerted himself. (Tr. 40). He carries an oxygen tank and also has an oxygen machine at his home. (Tr. 42).

At the time of formal hearing, Claimant was continuing treatment with Dr. Caletri. He would return to Dr. Doria if Dr. Caletri recommended that he do so. (Tr. 78).

Claimant testified that he does little physical activity. He attends church weekly, goes fishing, goes to the bank, and "takes care of [his] little business." His daughter helps him with the things he has to do. (Tr. 79). He pays neighborhood children to cut his grass. His sons perform household repairs that he cannot do. (EX-13, pp. 106-107).

At his deposition, Claimant testified he was receiving "long-term disability," but had been informed that he was covered for only 24 months. (EX-13, p. 32). At formal hearing, he testified that his first application for Social Security Disability, filed in June 2002, was denied. Subsequently, he hired an attorney and began receiving "Social Security and disability" and Medicare benefits. (Tr. 86).

Claimant qualified for Social Security Disability and estimated that he began receiving payments in October 2004, approximately four or five months prior to formal hearing. (Tr. 43). He receives just over $1,200.00 each month and the disability payments are his only source of income. (Tr. 44). His children are not dependent on him for financial support, although his youngest son lives at his home. (Tr. 84-85).

Claimant agreed that April 3, 2002, "sounds about right" as the last date of his employment and he has not worked since that date. He did not recall being told he could return to work by any of his physicians. (Tr. 72). He has not engaged in a job search since April 2002. According to Claimant, his doctors opined he could never weld again, but did not discuss working at other jobs. (Tr. 87-88).

Claimant is able to drive and has reliable transportation. His work history includes working as a mechanic and as an armed security guard. (Tr. 49, 89). He also has experience with shrimping, oyster dredging, and commercial fishing, but stated

he cannot perform such activities anymore. (Tr. 90; EX-13, p. 101). Claimant testified that he has never worked at a job where he had to "make change." He cannot use a computer and has never worked in a "sales" position. (Tr. 47).

Claimant's welding history includes working for Employer on the following three occasions: at the time the alleged injury was discovered, as a contractor through Hutco, and in 1979. (Tr. 102, 105). Claimant also performed the same kind of welding work for Dixie Shipyard, Inc., in 2000 and 2001; for Acadian Shipyard in 1995, 1996, and 1997; for Mitchell Tank and Repair in 1995; for Nationwide Tank Erectors in 1994 and 1995; for Chromalloy American Corporation in 1977, 1978, and 1979; and for Bourg Dry Dock & Service Company in 1977 and 1978. (Tr. 102-106; CX-3). Additionally, Claimant testified that he worked as a "roustabout" and did "very little" welding while employed with Houma Land & Offshore Company, Inc., in 1986 and with Dolphin Service, Inc., in 1983 and 1984. (Tr. 104; CX-3, p. 4).

Claimant filed a lawsuit against welding rod manufacturers, which has not been set for trial and from which he has not received any settlements. (Tr. 90-91). Claimant sustained two earlier back injuries and was out of work for several years due to one of the injuries. (Tr. 91-92).

Claimant smoked one and one-half to two packs of cigarettes each day for about 20 years. He stopped smoking when he was admitted to the hospital on April 4, 2002. (Tr. 53).

Al Boudreaux

Mr. Boudreaux testified at formal hearing. He is employed by Employer as a "welding foreman" and supervises "stick welders" and "flux core welders." (Tr. 31, 108). He testified Claimant was a "stick welder" and used welding rods which were provided to welders in five-pound bundles. (Tr. 31-32).

Mr. Boudreaux stated that Claimant "mostly" welded mild steel, but Claimant did perform some "stainless" welding. He agreed that Claimant would have used "stainless steel electrodes" for welding "stainless." (Tr. 31, 34-35, 111). He also testified that Claimant performed "low hydrogen" welding.[10] (Tr. 111). He could not recall whether Claimant welded "carbon steel." (Tr. 36).

[10] Mr. Broussard also referred to "low hydrogen" welding as "LH welding." (Tr. 123).

Mr. Boudreaux testified that welders would use welding rods specifically made for the material being welded. Any welding rods used for stainless steel would have the same composition regardless of the manufacturer of the rod. (Tr. 33-34). He reviewed a Material Safety Data Sheet for a Hobart Brothers rod, referencing "Stainless Steel Electrodes," and agreed that Claimant would "more than likely" have used that kind of material to weld stainless steel. (Tr. 35).

Mr. Boudreaux could not recall when he learned of Claimant's cancer, but testified that he probably learned of it after Claimant's surgery. He heard about Claimant's condition from another employee, rather than from Claimant. (Tr. 37). He did not know whether any accident reports were filed. (Tr. 38).

Mr. Boudreaux would "set up" the welders each morning by "showing him the job, tell him what he needs to do the job, and make sure he's getting everything he needs to get the job done." After setting up each of his workers, Mr. Boudreaux would follow-up on each "to make sure that they're doing what they're supposed to be doing." (Tr. 110). Claimant did not require much supervision and was an experienced welder. (Tr. 110). Mr. Boudreaux testified that Claimant performed mostly "mild steel" and "LH rod" welding. (Tr. 111).

The welders were required to use safety glasses, hardhat, steel-toed boots, and other personal safety equipment. (Tr. 111-112). The welders were instructed to use respirators and dust masks for breathing protection. Employees would receive a warning if they did not wear the mask and would eventually be "written up." Although Claimant sometimes did not wear his mask, Mr. Boudreaux testified that Claimant "normally" wore his mask and was never "written up" for not wearing his mask. (Tr. 113). He indicated that Claimant wore a paper dust mask 99% of the time. (Tr. 126). Employees could obtain a respirator or mask from "the warehouse" and the requests for such equipment were never refused. (Tr. 113).

Before a job was started, the tanks were "cleaned out" and a chemist would test for toxic and combustible materials. These checks were performed every morning by persons trained by chemists. (Tr. 114).

Claimant welded in areas such as engine rooms, tanks, hallways, and on propellers underneath boats. Some of the welding occurred outdoors and some occurred indoors. (Tr. 114).

In the "tight areas," Employer used "blowers" or would "run airbags" into the area to circulate the air. (Tr. 115-116). Mr. Boudreaux estimated that 75% of Claimant's time was spent welding in the "tight areas." (Tr. 116).

Mr. Boudreaux held weekly mandatory safety meetings, which Claimant attended. (Tr. 116-117). Additionally, the shipyard held mandatory meetings every other Wednesday which covered "everything that was going on in the yard." (Tr. 117). Mr. Boudreaux testified that safety was a priority for Employer and that employees have the right to shut down a job if they see something wrong. (Tr. 118-119).

Mr. Boudreaux described a "cartridge respirator" as a device that fits over one's mouth and nose and has two cartridges on each side. (Tr. 122). He indicated that a welding shield could be placed over a welder's face while using the "cartridge respirator." (Tr. 122). Mr. Boudreaux agreed that the "paper masks" used by welders were "dirty inside and outside" after being used. (Tr. 123-124; CX-18).

The Medical Evidence

Dr. William H. St. Martin[11]

Dr. St. Martin examined Claimant at Terrebonne General Medical Center (Terrebonne General) on April 4, 2002, at which time Claimant presented with complaints of shortness of breath, a cough, and weight loss. Claimant indicated he smoked two packs of cigarettes a day for 25 years. (EX-8, p. 32). An x-ray revealed "a bronchogenic carcinoma with postobstructive pneumonitis" and Dr. St. Martin suggested an open lung resection after consulting with Dr. Rau. (EX-8, pp. 33-34).

On April 20, 2002, Claimant was released from the hospital. A discharge summary dated April 21, 2002, indicated Claimant developed a "left lower infiltrate" post-operatively, which was treated with antibiotics. Dr. St. Martin prescribed a home oxygen set-up. (EX-8, p. 31).

On April 22, 2002, Dr. St. Martin indicated Claimant was not able to return to work until released by Dr. Rau. (EX-8, p. 43).

[11] Dr. St. Martin's credentials are not included in the record.

Dr. Eric Rau

Dr. Rau, a board-certified surgeon specializing in thoracic and vascular surgery, was deposed by the parties on February 17, 2005. (EX-15). He provided a consultation report on April 4, 2002, which noted Claimant presented to the emergency room at Terrebonne General with complaints of shortness of breath, a cough, and weight loss. It was noted Claimant had a 50-pack a year smoking history. (EX-6, p. 58).

After presenting to the emergency room, Claimant underwent x-rays that revealed a "mass lesion" in his right lung. (EX-6, p. 58; EX-15, p. 10). A bronchoscopy found the lesion was not affecting both lungs. A biopsy of the tumor revealed adenocarcinoma and Dr. Rau performed a lung resection and removed Claimant's entire right lung. (EX-6, pp. 17, 49, 59-60; EX-15, pp. 11-12). On discharge, Dr. Rau diagnosed lung cancer and felt Claimant's prognosis was "very good," although he indicated lung cancer is hard to "eradicate" even with surgery. (EX-15, p. 13).

Claimant returned to Dr. Rau for follow-up on May 1, 2002, May 22, 2002, and August 14, 2002 to determine how well he tolerated having one lung. Dr. Rau also had Claimant follow-up with Dr. Doria and undergo subsequent x-rays and CT scans. (EX-6, pp. 15-16; EX-15, pp. 14-15).

An "Attending Physician's Statement" on an insurance form for long-term disability benefits identifies a 50-pack year smoking history as contributing to Claimant's condition, but it does not mention exposure to welding fumes. (EX-15, p. 121).

Dr. Rau last saw Claimant on November 13, 2002. Claimant was physically doing well and declined a referral to a psychiatrist despite complaints of feeling depressed. (EX-6, p. 9; EX-15, pp. 15-16).

On October 23, 2002, Dr. Rau provided a letter concerning the causal effect of Claimant's work with Employer on his lung cancer. Dr. Rau opined it was unlikely that Claimant's nine month employment with Employer altered the course of the disease because it appeared the lung cancer was present for a long time and was well established. (EX-6, p. 10; EX-15, pp. 18-21). He testified that smoking is an "initiator" and "promoter" of lung cancer and he would assume smoking is the cause of lung cancer when presented with a heavy smoker. (EX-15, p. 21). Claimant was unhappy with the opinions expressed and his treatment with

Dr. Rau was terminated on November 20, 2002 after Claimant "accost[ed] [Dr. Rau's] front office help." (EX-15, p. 19).

Prior to his deposition, Dr. Rau was unaware that Claimant worked as a welder for most of his life, nor had he reviewed the material safety data sheets to determine the kinds of welding materials Claimant used.[12] (EX-15, pp. 32, 34). He testified that the length of Claimant's employment and information concerning Claimant's previous employment was the most helpful information because a few months or a couple of years of welding would not increase the risk of cancer, while 15 years of welding exposure would have a different effect. (EX-15, p. 37). At his deposition, Dr. Rau agreed with Dr. Caletri's opinion that exposure to welding rods and smoking caused Claimant's cancer given the length of time of exposure. (EX-15, p. 38). He testified that it is well established that "fumes associated with welding and gas blowing . . . do offer a higher risk of lung cancer" and he would agree with the statement that smoking and welding were "companion causes" of Claimant's injury. (EX-15, p. 40).

At his deposition, Dr. Rau reviewed representative "material safety data sheets" which indicated chromium and nickel were present in every type of welding rod identified.[13] Dr. Rau testified that he did not have any medical literature on cancer causing effects of chromium and nickel, but he stated that inhalation of any "irritating" substance can cause fibrosis and "siderosis" and can lead to carcinoma. (EX-15, pp. 34-35). He deferred to Dr. Caletri's opinion that welding by-products cause cancer, namely cadmium, nickel, and chromium. (EX-15, p. 35).

Dr. Rau testified that seeking the opinion of a pulmonologist is the safest and most cautious manner of determining whether Claimant is capable of working. (EX-15, p.

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[12] Dr. Rau stated that any "irritating" inhaled substance can lead to carcinoma if it causes chronic irritation. He would agree with Dr. Caletri's testimony that by-products from welding can cause cancer, specifically cadmium, nickel, and chromium. (EX-15, pp. 34-35).

[13] Employer objected to the material safety data sheets at Dr. Rau's deposition and at formal hearing on the basis that there is no foundation that the particular materials described therein were present at Employer's facility during the course of Claimant's employment with Employer. Nonetheless, the material safety data sheets were received into evidence at formal hearing. Based on Mr. Boudreaux's testimony, I find the sheets indicative of the contents of welding rods used by Claimant, even though such rods may have had different manufacturers.

38). He also testified that he provided reasonable and necessary treatment for Claimant. (EX-15, p. 39).

Dr. Rau signed insurance claim forms dated June 5, 2002; July 8, 2002; August 12, 2002; August 16, 2002 and September 5, 2002, which indicated Claimant was unable to work as of April 4, 2002. The forms also indicated that a return to work date was unknown. (EX-6, pp. 68-75).

Dr. Raul Doria[14]

Dr. Doria of Cancer Care Specialists, whose credentials are not identified in the record, completed a "Medical Questionnaire" regarding treatment of Claimant. (EX-18). On May 7, 2002, Claimant was seen by Dr. Doria and reported a history of his illness and indicated he was both a welder and a heavy smoker. (EX-9, p. 6). Dr. Doria ordered a PET scan, a bone scan, and a CT scan of Claimant's abdomen and pelvis. On May 15, 2002, Dr. Doria noted Claimant's PET scan was negative. (EX-9, p. 7).

On August 19, 2002, Dr. Doria noted Claimant's complaints of chest pain and shortness of breath. He also indicated that a CT scan of Claimant's head was normal. (EX-9, p. 7). On August 27, 2002 and February 18, 2003, no changes were noted. (EX-9, pp. 7, 9). An office note dated February 18, 2003, stated Claimant was "unable to work due to shortness of breath." (EX-9, p. 5).

A pulmonary function test was performed on December 22, 2003, and signed by Dr. R. Bourgeios. The "pulmonary function diagnosis" contained the following: (1) moderate obstructive airways disease, (2) severe restriction, and (3) severe diffusion defect. (EX-9, pp. 44-47).

On March 18, 2004, Claimant presented with complaints of chest pain. (EX-9, p. 11). Claimant returned to Dr. Doria on March 23, 2004 and March 29, 2004 to review a CT scan of his chest and a PET scan. On March 29, 2004, Claimant was referred to Dr. Caletri. (EX-9, p. 10). On May 28, 2004, Dr. Doria's office note contains an illegible comment regarding "port placement" and recommends that Claimant "re-start RT" and consider chemotherapy. (EX-9, p. 12).

[14] Several of Dr. Doria's office notes are handwritten and illegible.

Dr. Doria opined Claimant's "chronic obstructive pulmonary disease" pre-dated April 4, 2002. He further opined that Claimant's condition was manifest before April 4, 2002 through his symptoms. Dr. Doria did not have "personal first hand knowledge" of the specific substances to which Claimant was exposed as a welder. (EX-18, p. 1).

Dr. Thomas Grimstad[15]

Dr. Grimstad was deposed by the parties on February 21, 2005. (EX-16). He is board-certified in internal medicine and pulmonary disease and examined Claimant on May 6, 2003 at the request of Employer/Carrier. (EX-16, pp. 6, 9). Prior to the examination, Dr. Grimstad reviewed hospital records and x-ray reports from Terrebonne General. (EX-16, p. 10).

Claimant provided a history of working as a welder for 20 years, along with a history of his illness and treatment surrounding his lung cancer and surgery. (EX-16, p. 12). He reported smoking two packs of cigarettes each day until surgery and reported being around asbestos and welding for many years. (EX-16, pp. 12-13). At the time of the examination, Claimant had been prescribed oxygen and "bronchodilators." (EX-16, p. 13). On physical exam, Dr. Grimstad noted "sinus tachycardia," heart murmur, and decreased breath sounds. (EX-16, pp. 14-15).

Dr. Grimstad's impressions were as follows: (1) "bronchogenic carcinoma," (2) chronic obstructive pulmonary disease, (3) a history of cigarette smoking, and (4) a history of asbestos exposure. He did not feel there was a spread of the tumor. (EX-15, p. 16). Dr. Grimstad ordered a chest x-ray and pulmonary function test. (EX-16, p. 17). The chest x-ray revealed a right pneumonectomy, a "previous right thoractomy with pleural fluid occupying the majority of the right hemithroax, volume loss, and hyperinflation. (EX-7, p. 73; EX-16, p. 18). The pulmonary function test revealed airway obstruction and restriction. (EX-7, p. 19; EX-16, p. 20).

Dr. Grimstad opined Claimant's lung cancer was caused by "a combination of things," but stated that cigarette smoking is "the primary risk factor for lung cancer" and "would be the primary causative factor." (EX-16, pp. 22-23). He also opined

[15] The records submitted in Employer's Exhibit No. 7 include medical reports from the Family Doctor Clinic dated July 2001. (EX-7, pp. 7-9). There is no indication that these records relate to Claimant's cancer, nor does a review of the records reveal any information regarding treatment or discovery of the cancer.

asbestos exposure would be a factor. (EX-16, p. 23). He opined that nine months of work as a welder "in and of itself" would not alone be sufficient to cause Claimant's medical condition. (EX-16, p. 24). However, Dr. Grimstad indicated that welders "frequently have a lot of continuous irritation of the airways" that contribute to "the problem" over 15 to 20 years. (EX-16, pp. 24-25). He agreed an oncologist would better provide an opinion as to the causal relationship between cancer and welding exposure. (EX-16, p. 26).

On May 6, 2003, Dr. Grimstad further opined Claimant was "significantly disabled on the basis of his chronic lung disease" and concluded Claimant was "totally disabled" on the basis of the disease. (EX-7, p. 118). Dr. Grimstad testified Claimant was not able to return to work at the time of the examination. (EX-16, p. 27). Assuming Claimant underwent additional hospitalization and radiation on his remaining lung, Dr. Grimstad opined Claimant would be totally disabled. (EX-16, p. 28). Whether Claimant could return to employment would depend on the results of an updated evaluation, the requirements of the job, and Claimant's physical restrictions. (EX-16, p. 31). At his deposition, Dr. Grimstad stated that Claimant would certainly not return to welding. (EX-16, p. 31).

Dr. Charles D. Marable

Dr. Marable, who is board-certified in neurology, examined Claimant on May 20, 2003. Claimant reported being diagnosed with asbestosis in 2003. (CX-17, p. 1). He also reported a diagnosis of lung cancer with a "right lobectomy" and indicated he was on oxygen and inhalers. He presented with complaints of shortness of breath, cough, chest pain, and hoarseness, along with headaches, vertigo, dizziness, confusion, fatigue, and mood swings. Claimant indicated he smoked one and one-half to two packs of cigarettes each day for 15 to 20 years. (CX-17, p. 2).

Dr. Marable identified the following impressions: (1) peripheral neuropathy, (2) memory loss, (3) asbestosis, (4) cancer of the lung, (5) essential tremor, and (6) carpal tunnel syndrome. He recommended an EMG and nerve conduction study, a neuropsychiatric workup, follow-up with a pulmonary physician and hematologist/oncologist, and routine pulmonary function studies and chest x-rays. (CX-17, p. 3).

Dr. Marable opined that welding rods "have more than a 51% factor for causing [Claimant's] lung cancer, although cigarette smoking did cause some aggravation of the lung cancer." He

indicated Claimant was "100% disabled" and unable to return to work. (CX-17, p. 3). Dr. Marable maintained the foregoing opinions in a report dated January 19, 2004. (CX-17, p. 5).

Dr. David Caletri

Dr. Caletri is board-certified in radiation oncology and was deposed by the parties on February 1, 2005. (CX-2, p. 5). He first saw Claimant on March 31, 2004, upon referral from Dr. Doria for radiation therapy. (CX-2, pp. 8-9). Claimant presented with a history of a surgically removed "adenocarcinoma." Claimant was followed by Dr. Doria and was found to have "an uptake or recurrent disease in the mediastinal or pretracheal area . . ." (CX-2, p. 9).

Claimant provided a history of being a welder and a "30-50 pack a year smoker." (CX-2, p. 10). On physical exam, Dr. Caletri found Claimant asymptomatic and he diagnosed "a recurrent adenocarcinoma of the lung." (CX-2, p. 111). Dr. Caletri treated Claimant with "external beam radiation therapy" with a two to three week break in the daily radiation treatments due to a "port-infection." (CX-2, pp. 13-14; 57).

On April 2, 2004, a radiology report of Claimant's lungs identified "right paratracheal and superior mediastinal adenopathy." (CX-2, p. 51). A radiology report dated June 7, 2004, revealed "status post right pneumonectomy with right paratracheal lymph node enlargement, measuring 2 cm and unchanged." It also identified "increased soft tissue within the anterior mediastinum, which may represent lymph node enlargement . . .." (CX-2, p. 56).

On July 28, 2004 and September 21, 2004, Dr. Caletri found no clinical evidence of disease recurrence or progression. On July 29, 2004, a CT scan of Claimant's chest revealed "improvement in the right peritracheal and mediastinal lymph adenopathy when compared with [Claimant's] previous study of 03/22/04." A two centimeter "residual right pertiracheal lymph node" remained and "two subcentimeter nonspecific nodules within the left lower lobe" appeared stable. Emphysematous changes were noted involving the left upper lobe. (CX-2, p. 59).

Dr. Caletri last saw Claimant on October 13, 2004, at which time he found no evidence of the disease elsewhere in Claimant's body and found a decrease in the disease actually treated by radiation. (CX-2, p. 14). A radiology report dated October 14,

2004, found "no significant interval change from 6/7/04." (CX-2, p. 62).

Dr. Caletri suggested Claimant avoid dust, smoking and exposure to second-hand smoke or noxious gases. He indicated that an "occupational doctor" or pulmonary function tests would be better able to provide physical limitations for Claimant. (CX-2, pp. 19, 21). Dr. Caletri would not advise Claimant to return to such work. (CX-2, p. 20). He opined Claimant could have returned to "some type of work" between April 2002 and March 2004, but indicated the type of work had to be determined. (CX-2, p. 21). Regarding Claimant's ability to return to work, Dr. Caletri would defer to the opinions of pulmonologists who have interpreted the pulmonary function tests. (CX-2, p. 25).

Dr. Caletri indicated Claimant was at a greater risk of contracting cancer due to being a welder and a smoker. (CX-2, p. 12). He stated that exposure to tobacco and a welding environment caused Claimant to develop cancer at a young age, as it is uncommon in individuals of Claimant's age. (CX-2, pp. 16-17). He testified he would not expect cancer to the extent found in Claimant as a result of nine months of exposure to welding. He would expect the combination of 20 years of welding and 20 years of smoking to be the ongoing cause of cancer, but he could not determine whether "one window of welding did it." (CX-2, pp. 26-27). Although he could not identify the point in time that the cancer was "triggered," Dr. Caletri testified that "any exposure is a contributing or aggravating factor" in causing the cancer. (CX-2, pp. 33).

Dr. Caletri testified that "gaseous nickel exposure increased your risk of lung cancer without smoking," so when it is combined with smoking the two factors compound each other. (CX-2, p. 13). He further testified that chromium is a known carcinogen, as are cadmium and nickel. (CX-2, pp. 33-34).

Although he was "cautiously optimistic" concerning Claimant's lung cancer, Dr. Caletri could not provide a date of maximum medical improvement and indicated that he did not feel Claimant was at maximum medical improvement at the time of his deposition. He also indicated that treatment for cancer can cause "late term side effects" and that he would not discuss maximal improvement until one or two years post-treatment. (CX-2, pp. 15-16). He testified that the treatment provided by his colleagues, Dr. Doria, and himself, was necessary and reasonable. (CX-2, p. 22).

Radiology Reports

The record contains daily radiology reports dated April 4, 2002 through April 18, 2002. On April 4, 2002, Claimant underwent a chest CT scan which revealed a four centimeter mass in the right suprahilar region, "worrisome for carcinoma." (EX-7, pp. 63-64). On April 5, 2002, a radiology report indicated Claimant's remaining left lung was "clear," but an "interval increase infiltrate or atelectasis" was noted in Claimant's left lung on April 7, 2002. (EX-7, pp. 57, 61). On April 8, 2002, early opacification was also noted "in the right base." (EX-7, p. 57). On April 9, 2002, some improvement was noted in Claimant's left lung pneumonia and no significant changes were noted in subsequent daily radiology reports. (EX-7, pp. 52-55, 64-70).

On May 8, 2002, "several pleural based nodules" were identified in Claimant's left lower chest, which were later determined to likely represent scarring. On May 14, 2002, a PET scan revealed "no evidence of metastic disease or recurrent malignancy." (EX-9, pp. 55-56). On August 22, 2002, a chest CT scan noted "diffuse intralobular emphysema and chronic changes on the left," "a less than a centimeter nodular density" in Claimant's left lung base that appeared to be stable, and scarring in Claimant's left lung base. (EX-9, p. 51).

On August 20, 2003, no unusual post-surgical findings were identified and there was no other active chest disease revealed in the radiology report. (EX-9, p. 48).

On March 22, 2004, the radiology report identified a "right paratracheal and superior mediastinal adenopathy" which had increased since February 14, 2003. (EX-9, p. 40). A PET scan was performed on March 26, 2004, which showed "considerable abnormal activity" in the "inferior right mediastinum." It further identified "abnormal activity at the base of the neck on the right side that is probably adenopathy." (EX-9, p. 39).

On May 13, 2004, a radiology report noted Claimant's remaining left lung was clear with "no evidence of residual pneumothorax." (EX-9, p. 38). On May 15, 2004, Claimant had "diffuse infiltrates over the left lung field" that had improved on the following day. (EX-9, pp. 35-36). On July 29, 2004, a chest CT scan revealed "improvement in the right peritracheal and mediastinal lymph adenopathy" and indicated that two "nonspecific nodules" in Claimant's "left lower lobe" appeared stable. (EX-9, p. 32). On October 26, 2004, a PET scan showed

a "decrease in hypermetabolic chest activity in the right paratracheal region and right lateral chest wall," along with "increased activity within the posterior ribs bilaterally" which was possibly related to a "metabolic process" or radiation therapy. (EX-9, p. 31).

The Vocational Evidence

Sy J. Arceneaux

On March 28, 2005, at the behest of Carrier, Sy Arceneaux generated an "Initial Vocational Evaluation" of Claimant which included a summary of Claimant's medical history, disability, subjective complaints, and educational and vocational background. (EX-12). Mr. Arceneaux noted Claimant complained of increased pain and discomfort associated with increased activity. (EX-12, p. 3). He also noted Claimant completed the eighth grade, never obtained a GED, and is certified in welding. Claimant reported difficulty reading and writing, but indicated he could make change. (EX-12, p. 4). Mr. Arceneaux identified Claimant's transferable skills as "knowledge of tools, machines, materials, and methods used in trade or craft specialty; and adhering to object specifications and standards." (EX-12, p. 6). Mr. Arceneaux further identified Claimant's age as an "asset" and identified several "barriers" which included limited education, inability to work, pain and discomfort, and limited transferable skills. (EX-12, p. 6).

Mr. Arceneaux contacted potential employers regarding positions available to Claimant. He was unable to identify any positions that may be appropriate for Claimant and noted it would be "an arduous process" to assist Claimant in returning to any employment classified as less than medium duty. Mr. Arceneaux opined a position with Employer in "the Tool Room" may be an appropriate job for Claimant, but expressed concern that the job was in "an industrial environment." (EX-12, p. 9).

A questionnaire was forwarded to Drs. Caletri, Rau, Doria, and Grimstad regarding the light duty position available in Employer's tool room. Dr. Caletri indicated Claimant was unable to return to work in an industrial environment, but could perform work that would not cause shortness of breath and could work in an environment with excellent air quality. (EX-19; EX-20, p. 1). Dr. Rau would not comment on Claimant's ability to

perform the job because he had not examined Claimant since November 13, 2002.[16] (EX-20, p. 1).

The Contentions of the Parties

Claimant contends he is entitled to temporary total disability benefits from April 2, 2002 through October 14, 2004 and permanent total disability benefits from October 15, 2004 through present and continuing. Claimant contends he is entitled to disability benefits because he was exposed to shipyard welding during his employment with Employer and that his lung cancer was related in part to such welding exposure. Claimant further contends he timely notified Employer of his work-related injury and that Employer failed to establish suitable alternative employment. Finally, Claimant requests an award of past and future medical benefits related to his injury and treatment.

Employer contends Claimant has not established that his lung cancer was related to his employment, noting Claimant smoked heavily for twenty to twenty-five years and arguing that nine months of employment with Employer was not sufficient to cause lung cancer to the degree found in Claimant. At formal hearing, Employer raised the issue of notice, contending its first notice of possible work-relatedness occurred in December 2002. Employer argues it is not liable for medical expenses incurred at Terrebonne General Medical Center in April and May 2004 because Claimant's extended hospital stay was caused by the "intervening" actions of Claimant's physicians. Employer requests an order recognizing its lien or credit on any recovery gained through Claimant's third-party tort suits against welding rod manufacturers. Finally, Employer/Carrier contend they are entitled to Section 8(f) relief.

The Regional Solicitor argues Employer/Carrier are not entitled to Section 8(f) relief because none of the requisite elements for establishing entitlement have been met. Specifically, the Regional Solicitor argues that Claimant's smoking habit is not a pre-existing disability under the Act. The Regional Solicitor further argues that there was no prior diagnosis of any lung impairments in Claimant, thus the manifestation element is not satisfied. Lastly, it argues that Employer/Carrier failed to establish that a pre-existing medical

[16] A third questionnaire was return unsigned and without identifying the completing physician. The response to the questionnaire indicated Claimant could not return to work in an industrial environment or in Employer's tool room. (CX-18(a); CX-20, p. 2).

condition combined with Claimant's lung cancer to establish a greater degree of disability than the impairment resulting from the lung cancer alone.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Timely Notice

(1) Notice Under Section 12(a)

Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease, to be filed "within one year after the employee . . . becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability." 33 U.S.C. §912(a); Lewis v. Todd Pacific Shipyards Corporation, 30 BRBS 154 (1996)(work-related lung disease). In an occupational disease case, the filing period does not begin to run under Section 12 until the Claimant is actually disabled. Id.; see also Martin v. Kaiser, Co., 24 BRBS 112 (1990)(occupational lung cancer). It is the

claimant's burden to establish timely notice. See 33 U.S.C. §912(a).

Failure to provide timely notice of an injury, as required by Section 12(a), bars a claim unless it is excused under Section 12(d) of the Act. Pursuant to Section 12(d), the failure to provide such notice of an injury to an employer will not act as a bar to the claim if the employer either (1) had knowledge of the injury or (2) was not prejudiced by the lack of notice. See 33 U.S.C. §912(d)(1),(2); See Sheek v. General Dynamics Corp., 18 BRBS 151 (1986), decision on recon., modifying 18 BRBS 1 (1985).

In the absence of evidence to the contrary, Section 20(b) of the Act presumes that the notice of injury and the filing of the claim were timely. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, to establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure to provide timely notice pursuant to Section 12. See Cox v. Brady-Hamilton Stevedore Company, 25 BRBS 203 (1991); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (CRT) (5th Cir. 1978); Addison v. Ryan Walsh Stevedoring Company, 22 BRBS 32 (1989).

In the present matter, Claimant contends he gave Employer timely notice of the relationship between his employment and his lung cancer through "disability claim forms" signed on April 19, 2002 and April 26, 2002.[17] However, a review of the "disability

[17] Claimant's employment records provided by Employer indicate that Claimant received short-term disability benefits from April 18, 2002 through October 1, 2002. (EX-5, pp. 90, 93, 96, 98, 101, 103, 105). Claimant testified that he received long-term disability benefits for 24 months. Dr. Rau completed an "Attending Physician's Statement" form apparently in connection with Claimant's long-term disability benefits. (EX-6, pp. 68-69). Although Employer should have been aware of Claimant's lung cancer through the insurance forms completed in connection with his short-term and long-term disability benefits, the insurance forms do not contain any indication that Claimant's cancer was work-related. Consequently, these forms cannot be the basis of a determination of notice of the work-relatedness of Claimant's lung condition. Whether Claimant's short-term and long-term disability benefits

claim forms" reveals that the forms fail to indicate that Claimant's cancer was related to his work. Claimant signed one form on April 19, 2002, which responded "no" to the question of whether Claimant had or would file for Worker's Compensation Benefits. The same form included a section signed by Employer's representative on April 26, 2002, which indicated Claimant had neither made a claim for Worker's Compensation benefits nor was entitled to such benefits. (EX-5, p. 107). A second insurance form contains an "Attending Physician's Statement" signed by Dr. St. Martin, which indicated Claimant's condition was not due to sickness arising out of his employment. (EX-5, p. 108).

Claimant also testified that Dr. Rau had opined his cancer was caused by welding exposure prior to April 19, 2002, and that he informed a company person of this connection when he signed insurance papers while in the hospital. He also testified that he first spoke to "Tony," who was "in charge of the insurance," after he was released from the hospital.

Additionally, Claimant testified that he spoke to two unidentified "superintendents" at Employer's shipyard after he was released from the hospital. He stated that he "thinks" he told the superintendents that his cancer was work-related. However, the record contains no corroborative evidence indicating that such a conversation took place or that any report was made. Further, Claimant could not recall the date on which he made such a report to Employer.

Although Claimant credibly testified that he informed Employer that his cancer was work-related while in the hospital on April 19, 2002, the insurance form completed by Claimant contains no reference to his condition being work-related and simply indicates that he has not or will not file for Workers' Compensation Benefits.[18] Further, he is unable to recall the date on which he reported the work-related nature of his condition to the superintendents at Employer's facility; he could only state that he "thinks" he informed Employer's superintendents of the work-relatedness of his injury. Without more, despite Claimant's credibility, I find his testimony

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began due to a report by Claimant or simply because Employer had knowledge that he was hospitalized and unable to return to work is also undeterminable.

[18] It is noted "Group Disability Income Claim Form" did not question whether Claimant's condition was work-related and contains only the following two queries regarding the injury/illness and work: (1) "[w]ere you at work; and (2) [h]ave you or will you file for Worker's Compensation Benefits." Claimant answered "no" to both questions. (EX-5, p. 107).

insufficient to establish that he placed Employer on notice and insufficient to establish a date of such notification.

Nonetheless, Claimant filed a Workers' Compensation Claim with the State of Louisiana on December 5, 2002, and he filed an LS-203, "Claim for Compensation" on January 2, 2003. (CX-11; CX-12). Employer's "First Report of Injury or Occupational Illness" was filed on December 12, 2002, indicating that Employer "first knew of the accident" on December 12, 2002 and that Claimant claimed to have "contracted lung cancer from welding in the shipyard." (EX-1). I find that the foregoing documents support Claimant's contention that he timely provided notice of a relationship between his cancer and his work, as the documents were filed within one year of April 4, 2002.

Further, **assuming arguendo** that Claimant did not timely provide notice, I find Employer has presented no evidence and provided no argument regarding any prejudice suffered due to "untimely" notice. Employer's receipt of notice in December 2002 occurred more than two years before formal hearing was held in this matter. Consequently, I find and conclude Employer has not proved by substantial evidence that it was prejudiced in its ability to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services.

Based on the foregoing, I find and conclude Claimant timely notified Employer of his illness and the present claim is not barred under Section 12(a).

(2) Notice Under Section 13

Section 13(b)(2), as amended in 1984, states that a claim for death or disability due to an occupational disease will be timely filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence, or by reason of medical advice, should have been aware of the relationship between the employment, the disease, and the disability, or within one year from the date of the last payment of compensation, whichever is later. 33 U.S.C. §913(b)(2); See e.g., Blanding v. Director, OWCP, 186 F.3d 232, 234-35 (2nd Cir. 1999); Lewis v. Todd Pacific Shipyards Corp., supra; Morin v. Bath Iron Works Corp., 28 BRBS 205 (1994).

Claimant was first informed of a possible relationship between his lung cancer and his employment as a welder in April 2002. He filed a "Claim for Compensation" with the Department of Labor on January 2, 2003. (CX-11). Consequently, I find and

conclude that Claimant complied with the notice requirements of Section 13 by filing his claim within two years of becoming aware of the relationship between his employment, his disease, and his disability.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends the medical testimony of record establishes a relationship between his employment as a welder and his lung cancer. Consequently, Claimant contends he has established a **prima facie** case for compensation benefits. Employer, however, contends Claimant's twenty to twenty-five year history of heavy smoking was the true cause of the lung cancer. Employer additionally contends that nine months of employment at its facility was insufficient exposure to cause lung cancer to the extent found in Claimant.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, the medical evidence clearly establishes that Claimant suffered from lung cancer, which required surgical removal of his right lung. Additionally, Claimant testified that he was employed by Employer as a welder and used "welding rods" in the completion of his job duties, which is supported by the testimony of Mr. Boudreaux and by Employer's personnel records. (EX-5, p. 18).

Dr. Caletri opined that Claimant's exposure to a welding environment, along with his history of smoking, contributed to the development of Claimant's lung cancer. Although Dr. Rau opined that short-term welding employment was not a cause of Claimant's lung cancer, he indicated that long-term exposure to a welding environment could have caused lung cancer when combined with Claimant's smoking history. He testified that welding fumes offer a higher risk for the development of lung cancer. Lastly, Dr. Marable opined that Claimant's exposure to "welding rods" was "more than a 51% factor" in causing Claimant's lung cancer.

Additionally, Dr. Caletri testified that nickel, cadmium, and chromium are known carcinogens and Dr. Rau testified that inhalation of irritating substances can lead to carcinoma.

Claimant submitted several "Material Safety Data Sheets (MSDS)," which identify the hazardous ingredients in several material allegedly used by Claimant. A "MSDS" for "stainless electrodes" manufactured or supplied by Hobart Brothers identifies chromium and nickel as present in "stainless steel arc welding electrodes." (CX-10, p. 1). Both Claimant and Mr. Boudreaux testified that Claimant performed "some" welding on stainless steel. Mr. Boudreaux testified that welding rods for specific materials have that same composition regardless of the manufacturer.

Mr. Boudreaux further testified that Claimant performed "low hydrogen" welding, but could not recall whether Claimant welded "carbon steel." A "MSDS" for "Shielded Metal Arc Welding (SMAW) Low Hydrogen Carbon Steel" and "Shielded Metal Arc

Welding (SMAW) Low Hydrogen Low Alloy Steel," manufactured by Hobart Brothers, indicates that nickel and chromium are present in "Low Hydrogen Low Alloy Steel." The "MSDS" does not indicate nickel and chromium are present in "Low Hydrogen Carbon Steel." (CX-10, p. 8).

A "MSDS" for "All-State Electrodes for Welding Carbon, Stainless, and High Alloy Steels" manufactured by The ESAB Group, Inc., indicates that chromium and nickel are present in its "SMAW electrodes" and welding rods. (CX-10, p. 10).

Based on the foregoing, I find and conclude Claimant established that a harm or injury occurred and that conditions existed during his employment with Employer that could have caused such harm or injury. Thus, Claimant has established a **prima facie** case sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to

the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Each physician of record noted that Claimant presented with a history of long term, heavy cigarette smoking. Dr. St. Martin noted Claimant smoked two packs of cigarettes each day for 25 years. Dr. Rau identified a 50-pack a year smoking history based on the information provided by Claimant, while Dr. Caletri identified Claimant as a 30 to 50-pack a year smoker. Dr. Doria merely noted Claimant presented as a "heavy smoker" and Claimant informed Dr. Grimstad that he smoked two packs of cigarettes each day until surgery. Finally, Dr. Marable indicated Claimant smoked one and one-half to two packs of cigarettes each day for 15 to 20 years.

On a disability claim form, Dr. St. Martin signed an "Attending Physician's Statement" that indicated Claimant's condition was not due to sickness arising out of his employment. (EX-5, p. 108). Additionally, Dr. Grimstad opined cigarette smoking was the "primary causative factor" of Claimant's lung

cancer and deferred to the opinion of an oncologist regarding the causal relationship between cancer and welding exposure. Claimant's remaining physicians noted that cigarette smoking played some causal role in his development of lung cancer.

Based on the foregoing opinions, I find and conclude Employer has presented substantial evidence to suggest Claimant's lung cancer was caused by cigarette smoking rather than by working conditions. Therefore, the record evidence as a whole must be weighed and evaluated to determine work-relatedness and causation.

3. Conclusion or weighing all the evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Dr. St. Martin treated Claimant in connection with his initial hospital visit and surgery. A review of his medical reports reveals no discussion of Claimant's welding history or degree of exposure to welding materials. Dr. St. Martin's credentials are not included in the record, he was not deposed by the parties, and he offered no opinion regarding causation other than the "checked off" statement in the attending physician's report. Accordingly, I afford little weight to the conclusions of Dr. St. Martin.

Claimant submitted a report from Dr. Marable who concluded that welding rods were "more than a 51% factor" in causing Claimant's lung cancer. He noted that cigarette smoking caused "some aggravation" of the cancer, as well. Dr. Marable examined Claimant once and is board-certified in neurology. His conclusions appear to be based on Claimant's subjective complaints and reports of work conditions. His medical reports

of record do not include any objective testing other than hand-written notes of a physical examination. Based on the foregoing, I afford little weight to the conclusions of Dr. Marable.

I find the opinions of Dr. Grimstad are arguably equivocal. He suggested smoking is a primary cause of lung cancer, but also indicated that welders often experience irritation "of the airways" which would contribute to "the problem" over 15 to 20 years. He deferred to the opinion of an oncologist on the causal relationship between cancer and exposure to a welding environment. Based on the foregoing, I find Dr. Grimstad did not offer a firm opinion regarding causation in the present case.

Dr. Rau and Dr. Caletri are in agreement that Claimant's lung cancer was caused by a combination of his smoking habits and his exposure to a welding environment for 15 to 20 years. In a letter dated October 23, 2002, Dr. Rau noted Claimant's smoking habits and opined it was unlikely that Claimant's condition was caused by his nine month employment with Employer. During his deposition, Dr. Rau identified smoking as an "initiator" and "promoter" of lung cancer and initially assumed smoking was the cause of Claimant's condition. However, after being informed that Claimant worked as a welder for most of his life, Dr. Rau testified that smoking and exposure to welding rods caused Claimant's cancer and he referred to both factors as "companion causes" of Claimant's injury/condition.

Dr. Caletri is board-certified in radiation oncology and began treating Claimant in March 2004. Given his credentials and his status as a treating physician, I accord greater weight to his opinions in this matter. He indicated Claimant was at a greater risk of developing cancer due to being a welder and a smoker and opined that exposure to both welding and tobacco caused Claimant to develop cancer at a young age.

Although the medical reports of record indicate that Claimant's long term smoking habit contributed to Claimant's lung cancer, the opinions of Dr. Rau and Dr. Caletri, of which I give the greatest weight, conclude that Claimant's employment history as a welder also contributed to the development of lung cancer. Only Dr. St. Martin opined unequivocally that Claimant's illness was unrelated to his employment. As previously discussed, Dr. St. Martin's reports arguably do not consider a long history of employment as a welder. Accordingly, I find and conclude the record supports a finding that

Claimant's exposure to a welding environment combined with his smoking history to cause the development of lung cancer. Accordingly, I find and conclude Claimant's lung cancer was causally related to his employment with Employer.

Employer repeatedly points to the fact that it employed Claimant for only nine months prior to the discovery of lung cancer. Employer references the testimony of Dr. Grimstad, Dr. Rau, and Dr. Caletri, who opined that nine months of welding would not be sufficient to cause lung cancer to the extent present in Claimant. However, under the aggravation rule, if an employment-related injury contributes to, combines with, or aggravates an underlying condition to result in disability, the entire resultant condition is compensable; the relative contributions of the work-related injury and the prior condition are not weighed. See generally Peterson v. General Dynamics Corporation, 25 BRBS 71 (1991); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1996); LaPlante v. General Dynamics Corp./Electric Boat Div., 15 BRBS 83(1982).

The medical testimony establishes that Claimant's smoking combined with long term exposure to a welding environment to cause Claimant's lung cancer. The record evidence establishes that Claimant was employed as a "stick welder" for Employer. Despite Employer's contention that appropriate safety measures were instituted to prevent noxious substances from being inhaled by workers, I find there is insufficient evidence to conclude these safety measures were 100% effective. Accordingly, I find and conclude Claimant's employment with Employer exposed him to welding fumes. Under the aggravation rule, it is arguably irrelevant whether exposure at Employer's facility was the sole cause of Claimant's cancer. Because Claimant was exposed to a welding environment and based on the testimony of examining physicians, I find that Claimant's employment with Employer at least contributed to, combined with, or aggravated an underlying condition.

Moreover, it is well-established that the last employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation. See Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2nd Cir. 1955) cert. denied, 350 U.S. 913 (1955). Employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that Claimant was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer, which it has failed to do. Lewis, supra at

157; see Lins v. Ingalls Shipbuilding, Inc., 26 BRBS 62, 64-65 (1992).

C. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, nonetheless the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Between June 2002 and September 2002, Dr. Rau signed several insurance forms that indicated Claimant was unable to work as of April 4, 2002. Additionally, these insurance forms also indicated that a return to work date was unknown. There is no record evidence that Dr. Rau released Claimant to return to work during the course of his treatment. In February 2003, Dr. Doria noted Claimant was "unable to work due to shortness of breath."

Dr. Grimstad opined Claimant was totally disabled on May 6, 2003. During his deposition, he stated Claimant would not be able to return to employment as a welder. Finally, Dr. Caletri testified that he would not advise Claimant to return to employment as a welder. Although he opined Claimant could have returned to some form of employment, Dr. Caletri would defer to the opinion of a pulmonologist regarding the kind of employment. In response to an employment questionnaire, Dr. Caletri further specified that Claimant could not return to work in an industrial environment and would be limited to performing a job that did not cause shortness of breath.

Based on the foregoing, I find and conclude Claimant has established a **prima facie** case of total disability. Several physicians opined Claimant could not return to work at the time he underwent an examination or treatment. Dr. Rau specifically indicated Claimant could not return to work as of April 4, 2002. Additionally, there is no indication from any physician that Claimant could return to his former employment as a welder. Rather, Dr. Grimstad and Dr. Caletri specifically opined Claimant could not return to employment as a welder. Accordingly, I find and conclude Claimant is totally disabled as of April 4, 2002.[19]

Subsequent to formal hearing, the parties submitted a supplemental joint stipulation in which they agreed to an MMI date of October 14, 2004. The parties based the stipulated date on a medical report from Dr. Caletri dated October 13, 2004. In the October 13, 2004 report, Dr. Caletri indicated that he found "[n]o clinical evidence of disease recurrence or progression." However, at his February 1, 2005 deposition, Dr. Caletri opined Claimant had not yet reached MMI and further indicated that he would not discuss MMI until one to two years "post-treatment," due to possible remission and late term side effects.

[19] It is noted that Claimant requested an award of temporary total disability benefits commencing April 2, 2002. I find the record does not support a commencement date of April 2, 2002. The records from Terrebonne General Medical Center identify an "admit date" of April 4, 2002. One insurance claim form contains an "Attending Physician Statement" signed by Dr. St. Martin and indicates Claimant was "continuously totally disabled (unable to work)" from April 4, 2002. (EX-5, p. 108). Additional insurance claim forms signed by Dr. Rau also identify April 4, 2002 as the date of Claimant's disability. Finally, an insurance form completed by Employer identifies April 3, 2002 as Claimant's last day of work. (EX-5, p. 88). Based on the foregoing, I find the record supports April 4, 2002 as the date Claimant's disability was discovered and the date on which his compensation benefits should commence.

Notwithstanding the joint stipulation submitted by the parties, I find the October 14, 2004 MMI date is not supported by the evidence or medical records. Although Dr. Caletri's report of October 13, 2004 could arguably be interpreted as an expression of maximum medical improvement, his later deposition testimony specifically addresses MMI and he specifically stated that he did not believe Claimant was "maximally improved yet." Accordingly, I find and conclude Claimant has not reached MMI and remains temporarily disabled.

Based on the foregoing, I find and conclude Claimant is temporarily totally disabled beginning April 4, 2002 and continuing, as a result of his work-related illness.

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and

mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of

alternative work that renders [him] totally disabled, not merely the degree of physical impairment." Id.

Employer/Carrier submitted a vocational evaluation performed by Sy Arceneaux on March 28, 2005. Mr. Arceneaux considered Claimant's medical history, disability, subjective complaints, and vocational and educational backgrounds. He contacted several potential employers and was unable to identify any available positions. Mr. Arceneaux suggested a position in Employer's "tool room" as suitable alternative employment. However, Dr. Caletri declined to approve the position given the industrial environment in which Claimant would be required to work.

Based on the foregoing, I find and conclude Employer has not established suitable alternative employment. Accordingly, I find and conclude Claimant is entitled to temporary total disability compensation from April 4, 2002 through present and continuing, based on his average weekly wage of $788.37.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer/Carrier is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but

only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Employer/Carrier specifically contend they are not liable for medical expenses incurred at Terrebonne General Medical Center in April and May 2004. They contend that the actions of Claimant's physicians, which caused a "port infection" and subsequent hospitalization, are an intervening cause which absolved Employer/Carrier's liability for medical expenses incurred in connection with treatment of the infection.

The employer is liable for all medical expenses which are the **natural and unavoidable result of the work injury**, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65(1980). The employer is liable for medical services for all legitimate

consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. Lindsay v. George Washington Univ., 279 F.2d 819 (D.C. Cir. 1960); see also Austin v. Johns-Manville Sales Corp., 508 F.Supp. 313 (D.Me. 1981).

Claimant testified that his lung collapsed when a "port" was inserted for his chemotherapy treatments. Dr. Caletri testified that Claimant's treatment was "held up" for two to three weeks due to a "port infection." Dr. Caletri further stated that a risk of infection is always present when "putting anything in somebody."

I find and conclude Employer remains liable for the medical expenses incurred during the months of April and May 2004. Claimant underwent chemotherapy treatment as a result of his work-related injury and such treatment was reasonable and necessary. As evidenced by the testimony of Dr. Caletri, the risk of an infection is always present in the method of treatment received by Claimant. Accordingly, I find any additional medical expenses related to the "port infection" or lung collapse are the natural and unavoidable result of Claimant's work-related lung cancer. Even assuming the infection or lung collapse resulted from error on the part of Claimant's physicians, I find and conclude Employer is liable for the ensuing medical expenses as the expenses stemmed from treatment for a compensable injury.

Having found and concluded that Claimant suffered a compensable injury, Employer/Carrier are responsible to Claimant for all reasonable, necessary and appropriate medical expenses casually related to his April 4, 2002 work injury.

G. Section 8(f) Application

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

Although Employer filed a Section 8(f) application and a response was filed by the Regional Solicitor, I find and conclude Section 8(f) relief is premature and inapplicable in the instant case because, as previously discussed, I find and conclude Claimant continues to be temporarily totally disabled

and has not reached a state of permanency. Accordingly, Employer/Carrier's Section 8(f) application is **DENIED.**

H. Section 33(f) Application

Employer contends it is entitled to a credit on the net amount of any recovery Claimant obtains from third-party tort claims against welding rod manufacturers. Although the issue was briefly addressed at formal hearing, Claimant did not discuss this issue in his brief.

Section 33(f) of the Act provides:

> If the person entitled to compensation institutes proceedings within a period prescribed in Section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney fees).

33 U.S.C. §933(f).

An employer is entitled to a Section 33(f) credit only when a claimant receives some form of compensation based upon the injury for which the employer would be liable under the Act. Chavez v. Todd Shipyards Corp., 27 BRBS 80 (1993). The credit is to protect the employer from the claimant receiving a double recovery for one injury. Recent jurisprudence has established that an employer's right to a credit arises when the employer is held liable to pay benefits under the Act to a person who has entered into a third party settlement. Taylor v. Plant Shipyard Corp., 32 BRBS 155 (1998).

In the instant case, Claimant testified that he has instituted a lawsuit against welding rod manufacturers. He further testified that he had not received any settlements in connection with such lawsuit at the time of formal hearing. The parties stipulated that no benefits had been paid to Claimant.

Because Employer has not paid compensation benefits to Claimant and because the record is devoid of evidence that Claimant has actually received any settlements from the third-

party tort suits, I find and conclude Employer's request for an order recognizing a lien on third party recovery is premature.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, I find Employer was notified of Claimant's injury on December 12, 2002. Employer filed its first notice of controversion on December 23, 2002. Employer filed a second notice of controversion on January 17, 2003.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[20] Thus, Employer was liable for Claimant's total disability compensation payment on December 26, 2002. Because Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by January 9, 2003, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer timely filed a notice of controversion on December 23, 2002, and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our

[20] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[21] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from April 4, 2002 to present and continuing, based on Claimant's average weekly wage of $788.37, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

[21] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 9, 2004**, the date this matter was referred from the District Director.

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's work injury, including the treatment for "port infection," pursuant to the provisions of Section 7 of the Act.

3. Employer shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 3rd day of August, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge